eBay Inc. v. Digital Point Solutions, Inc. et al Doc. 3

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

EBAY, INC., Plaintiff, v. DIGITAL POINT SOLUTIONS, INC., SHAWN HOGAN, KESSLER'S FLYING CIRCUS, THUNDERWOOD HOLDINGS, INC., TODD DUNNING, DUNNING ENTERPRISE, INC., BRIAN DUNNING, BRIANDUNNING.COM, and DOES 1-20, Defendants.	CASE NO.: CV-08-4052 JF **DECLARATION OF STEWART H. FOREMAN IN SUPPORT OF MOTION TO DISMISS BY DEFENDANTS TODD DUNNING AND DUNNING ENTERPRISE, INC.** Date: December 12, 2008 Time: 9:00 a.m. Place: Courtroom 3, 5th Floor 280 South First Street San Jose, CA 95113

I, Stewart H. Foreman, declare:

1. I am a member of the Bar of the State of California and I am admitted to practice before this Court. I am a partner in the firm of Freeland Cooper and Foreman LLP, 150 Spear Street, Suite 1800, San Francisco, California 94105. I am counsel for defendants Todd Dunning and Dunning Enterprise, Inc. in this matter.

2. I have personal knowledge of the facts contained in this Declaration and I am competent to testify to these facts.

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3. The documents referenced in this Declaration are submitted solely in support of the moving parties' motion to change venue under Fed. Rule Civ. Proc. 12(b)(3).

4. Attached hereto and incorporated by reference herein as Exhibit 1 is a true and correct copy of a document entitled eBay Affiliate Program-Supplemental Terms and Conditions dated November 2004. By its terms, this document is incorporated by reference into the Commission Junction Publisher Service Agreement, although this document is prepared by eBay, Inc. and purports to be applicable to parties participating in eBay's Affiliate Marketing Program ("AMP"). This document was produced by Commission Junction, Inc. in connection with the case of *Commission Junction, Inc. v. Thunderwood Holdings, Inc. et. al*. Case No. 30-2008-00101025 (the "State Court Action") pending in the Superior Court of the State of California, County of Orange, Central Branch, in which Todd Dunning and Dunning Enterprises, Inc. are also defendants. This document was produced by Commission Junction, Inc. in the State Court Action with document numbers 0000647-52.

5. Attached hereto and incorporated by reference herein as Exhibit 2 is a true and correct copy of a document entitled eBay Terms and Conditions-eBay Affiliate Program-Supplemental Terms and Conditions, dated October 1, 2005, and Exhibit 3 is a true and correct copy of a document entitled eBay Terms and Conditions-eBay Affiliate Program-Supplemental Terms and Conditions dated June 2007. These documents by their terms are incorporated by reference into the Commission Junction Publisher Service Agreement and purport to be applicable to parties participating in eBay's AMP. These documents were produced by Commission Junction, Inc. in the State Court Action and have document identification numbers 0000636-646.

6. Documents identified as Exhibits 1 through 3 are the documents produced by Commission Junction, Inc. which purport to describe the relationship among Commission Junction, Inc., eBay, Inc. and these defendants related to eBay's AMP. None of these documents contain any provision purporting to provide these defendants' consent to venue in this federal district court. Commission Junction, Inc. consented to the filing of these documents in this action pursuant to the terms of a Stipulated Protective Order in the State Court Action.

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7. Attached hereto and incorporated by reference as Exhibit 4 is a true and correct copy of the User Agreement that I printed from the eBay website on October 22, 2008. I previously requested from David Eberhart, counsel for eBay, a copy of the User Agreement referenced in eBay's complaint. He declined to provide me with a copy. This document states that the User Agreement "describes the terms on which eBay offers you access to our services." This User Agreement does not reference eBay's AMP.

8. Defendant Kessler's Flying Circus ("KFC") was originally represented by my law firm in the State Court Action. KFC will be represented by independent counsel in this action and in the State Court Action.

I declare under penalty of perjury under the laws of the State of California and the laws of the United States that the foregoing is true and correct.

Executed on the 27th day of October, 2008 at San Francisco, California.

/s/

Stewart H. Foreman

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